

**December 19, 2007**

**DECISION AND ORDER  
OF THE DEPARTMENT OF ENERGY**

**Appeal**

Name of Petitioner: Terry M. Apodaca

Date of Filing: October 31, 2007

Case Number: TFA-0229

This Decision concerns Terry M. Apodaca's Appeal from a determination that the Department of Energy's (DOE) NNSA Service Center (NNSA) issued to her on August 3, 2007. In that determination, NNSA responded to Ms. Apodaca's request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as DOE implemented in 10 C.F.R. Part 1004. This Appeal, if granted, would require NNSA to perform an additional search and either release newly discovered documents or issue a new determination justifying their withholding.<sup>1</sup>

**I. Background**

Ms. Apodaca filed a FOIA request with NNSA for documents regarding unauthorized release of personally identifiable information (PII) at the NNSA Service Center. Apodaca Request. Ms. Apodaca limited the scope of her request to the years between 2000 and the present. The NNSA provided Ms. Apodaca 34 documents. The NNSA stated that in processing Ms. Apodaca's request, it contacted the Office of Human Capital Management Services, the Information Technology Department, the Facility Security Officer, the Inquiry Official, and Program Manager for Incidents of Security Concern. None found responsive documents. Determination Letter.

Ms. Apodaca filed this Appeal, challenging the adequacy of the NNSA's search. Specifically, Ms. Apodaca appealed:

- (i) The NNSA's determination that it could not locate documents at the above-referenced NNSA offices;
- (ii) The NNSA's failure to process her request at the Cyber Security Site Manager's Office (CSSM), as she had requested after filing her FOIA request;

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<sup>1</sup> William M. Schwartz, OHA Senior FOIA Official, recused himself from this case.

- (iii) The NNSA's failure to process her request at the Y-12 facility, which Ms. Apodaca claims experienced a March 2007 PII breach; and
- (iv) The NNSA's failure to produce documents regarding a PII breach "a few years back" that "affected over 1,500 NNSA employees."

Appeal Letter.

## II. Discussion

### 1. Applicable Authority

In responding to a request for information filed under the FOIA, courts have established that an agency must "conduct[] a search reasonably calculated to uncover all relevant documents. . . ." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542.

We have not hesitated to remand a case where the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, 28 DOE ¶ 80,239 (2002) (Case No. VFA-0760) (remanding for a renewed search where DOE's initial search missed responsive documents that were later found);<sup>2</sup> *Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995) (Case No. VFA-0098) (remanding where there was "a reasonable possibility" that responsive documents existed at an unsearched location).

A FOIA appellant must file their appeal within thirty days of receiving the determination. 10 C.F.R. § 1004.8(a). OHA reserves the discretion to accept an untimely appeal to promote administrative efficiency, if, upon consulting the determination issuer, review remains practicable, given the determination issuer's possible file relocations, staffing changes, or other circumstances. *See, e.g., Nevaire S. Rich*, 27 DOE ¶ 89,241 (1999) (Case No. VFA-0523); *Int'l Bhd of Elec. Workers*, 27 DOE ¶ 80,152 (1998) (Case No. VFA-0421).

### 2. Analysis

#### a. *Search at Several NNSA Offices and the CSSM*

Ms. Apodaca appealed the adequacy of the NNSA's search because it could not locate responsive documents at the NNSA offices listed above.

We contacted the NNSA to evaluate its search. The NNSA issued its determination to Ms. Apodaca on August 3, 2007. Ms. Apodaca filed her Appeal on October 31, 2007 – nearly two months past her 30-day regulatory deadline. As a result, reviewing the NNSA's search is now impracticable; NNSA officials cannot recall the exact searches that they performed for Ms.

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<sup>2</sup> OHA decisions issued after November 19, 1996 may be accessed at <http://www.oha.doe.gov/foia1.asp>.

Apodaca's request. E-mail from Carolyn Becknell, NNSA, to David M. Petrush, OHA, December 4, 2007. Therefore, we will deny this portion of Ms. Apodaca's Appeal.

Ms. Apodaca appealed the adequacy of the NNSA's search due to the apparent fact that it did not conduct searches at the CSSM. In fact, the NNSA did contact the CSSM and the search that CSSM conducted produced no responsive documents. E-mail between Carolyn Becknell, NNSA, and David M. Petrush, OHA, November 7, 2007. However, just as with the several offices listed above, it is now impracticable to evaluate NNSA's search at the CSSM. Therefore, we will also deny this portion of Ms. Apodaca's Appeal.

b. *The NNSA's Failure to Search the Y-12 Facility*

Ms. Apodaca appealed the adequacy of the NNSA's search because the NNSA did not search the Y-12 facility.

The NNSA contacted every source in its experience that is likely to have records regarding unauthorized PII releases and broadened its search according to their suggestions. None suggested that the NNSA search the Y-12 facility. E-mail from Carolyn Becknell, NNSA, to David M. Petrush, OHA, November 7, 2007; Memorandum of telephone conversation between Carolyn Becknell, NNSA, and David M. Petrush, OHA, November 28, 2007.

We find that the NNSA's search was adequate. Under *Miller*, the NNSA need not have exhausted every search possibility. Instead, its search was reasonable because it contacted those individuals and offices that it believed most likely to have the records Ms. Apodaca requested. Therefore, we will deny this portion of Ms. Apodaca's Appeal.

c. *Failure to Produce Documents Involving a Breach of PII that Affected Over 1,500 NNSA Employees*

Ms. Apodaca appealed the adequacy of the NNSA's search because the NNSA did not produce documents regarding "a breach of PII . . . that affected over 1,500 NNSA employees . . ." that occurred "[a] few years back. . ." Appeal Letter. The NNSA has agreed to conduct a search for responsive documents regarding this incident. Memorandum of telephone conversation between Carolyn Becknell, NNSA, and David M. Petrush, OHA, December 14, 2007. Therefore, we will remand this portion of Ms. Apodaca's Appeal to the NNSA.

It Is Therefore Ordered That:

- (1) The Appeal that Terry M. Apodaca filed on October 31, 2007, OHA Case No. TFA-0229, is granted in part, as specified in paragraph (2) below, and denied in all other respects.
- (2) This matter is remanded to the NNSA to conduct a search for documents regarding a breach of PII that affected over 1,500 NNSA employees as described in this Decision.
- (3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Fred Brown  
Associate Director  
Office of Hearings and Appeals

Date: December 19, 2007